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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSE G. CANTU AND SHIRLEY A. FONTENOT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the joint representation of petitioners deprive them of their Sixth Amendment right to effective assistance of counsel?

2. Did the failure of defense counsel or the trial court to move for relief from prejudicial joinder constitute error so serious as to deprive petitioners of a fair trial?

3. Did the admission into evidence of a co-defendant's conviction constitute plain error so serious as to require reversal?

4. Was the trial court's refusal to permit a presentence investigation report before sentencing violative of the purpose of Federal Rule of Criminal Procedure 32(c)?

5. Did the failure of appellate counsel to raise any issue on appeal for petitioner Fontenot and an insufficient issue on appeal for petitioner Cantu constitute ineffective assistance of counsel in violation of petitioners' Sixth Amendment rights?

The parties to this proceeding are United States of America, Jose G. Cantu and Shirley A. Fontenot.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 24, 1985, and its judgment denying rehearing entered April 9, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 774 F.2d 1305, appears in the appendix, page A-1. The judgment of the Court of Appeals denying rehearing appears in the appendix, page A-9. The judgment of the United States District Court for the Southern District of Texas, not reported, as to appellant Jose G. Cantu, appears in the appendix, page A-12. The judgment of the United States District Court for the Southern District of Texas, not reported, as to appellant Shirley A. Fontenot, appears in the appendix, page A-14.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was rendered and entered on October 24, 1985. The judgment denying rehearing was rendered and entered on April 9, 1986. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI (Right to Counsel). See appendix at A-16.

STATEMENT OF THE CASE

On August 24, 1984, an indictment was issued in the Southern District of Texas jointly charging defendants Cantu, Fontenot and Steven Austin ("Austin") with eighteen felony counts. Cantu and Fontenot retained

Michael P. Haines as their attorney. On October 12, 1984, a superceding indictment was issued charging Cantu, Fontenot and Austin with one count of conspiracy to commit tax fraud in violation of 18 U.S.C. § 286; seven counts of making false claims for tax refunds in violation of 18 U.S.C. § 287; one count of theft of public money of the United States in violation of 18 U.S.C. § 641; and, nine counts of mail fraud in violation of 18 U.S.C. § 1341. On October 22, 1984, U.S. District Judge Cire granted the motion for severance of defendant Austin.

Due to the illness of Judge Cire, U.S. District Judge Clure Morton, from the Middle District of Tennessee (sitting by designation), presided over the jury trial of Austin, and the subsequent joint jury trial of Cantu and Fontenot. Judge Morton acquitted Fontenot of all counts of the indictment except counts 4, 12 and 17, prior to submitting the case to the jury. On February 27, 1985, the jury returned a verdict of guilty on eighteen counts as to Cantu, and guilty on counts 4, 12 and 17 as to Fontenot. On March 1, 1985, without benefit of a pre-sentencing investigation, Judge Morton sentenced Cantu to a total of six years imprisonment, to be followed by a five year term of probation. Cantu was further ordered to pay $15,000.00 restitution. Fontenot was sentenced to eighteen months imprisonment, to be followed by a three year term of probation. Notice of appeal was filed for Cantu and Fontenot on March 1, 1985.

On October 24, 1986, the Fifth Circuit Court of Appeals denied petitioners' appeal. A motion for rehearing, filed on December 20, 1985, was denied on April 9, 1986.

It should be noted that both petitioners were represented by Michael Haines, Esq. through the appeal to the Fifth Circuit. The undersigned attorneys were retained after the trial court decision was affirmed by the Fifth Circuit. A petition for rehearing was then filed alleging that: the district court improperly permitted the joint representation of petitioners at trial thus depriving them of effective assistance of counsel; the failure of defense counsel or the trial court to move for relief from the prejudicial joinder deprived the petitioners of a fair trial; the district court improperly allowed into evidence the conviction in a separate trial of co-defendant Steven Austin; the conviction of Austin was emphasized by the government on closing argument and was also improperly referred to by defense counsel; the instruction issued by the trial court regarding Austin's conviction was not cautionary, but instead served to emphasize its consideration by the jury; the district court abused its discretion in sentencing petitioners without a presentence report and without adequate information and reflection and such an abuse reduced the sentencing hearing to a meaningless formality; and, appellate counsel's failure to raise any legitimate issues on appeal constituted ineffective assistance of appellate counsel.

On rehearing the Fifth Circuit found that there was no ineffective assistance of counsel and thus no denial of petitioners' Sixth Amendment rights. The Fifth Circuit's opinion, however, is based on four fundamentally erroneous factual conclusions the majority of which are derived from the government's brief. The four factual errors are: the Fifth Circuit erroneously found that petitioners Cantu and Fontenot shared a joint defense that neither party filed fraudulent tax returns; the Fifth Circuit er-

roneously found that the district court had information "at hand" sufficient to dispense with a presentence report; the Fifth Circuit erroneously found that the district court properly cautioned the jury that Austin's conviction was not to be relied upon in determining the petitioners' guilt or innocence; and the Fifth Circuit erroneously found that evidence obtained from the search made the issue of petitioner's original appeal related to the evidence against both Cantu and Fontenot. The third point of error in the Fifth Circuit opinion is so fundamentally incorrect that it was not even posited in the government's brief. The Fifth Circuit's errors are discussed in detail herein.

REASONS FOR GRANTING THE WRIT

I. Joint representation of petitioners deprived them of their Sixth Amendment right to effective assistance of counsel.

Petitioners assert that an actual conflict of interest existed in their joint representation and that such conflict adversely affected their attorney's performance. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978). The reasoning for this is explained in *Holloway* as follows:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . The mere physical presence of an attorney does not fulfill the Sixth Amendment guar-

> antee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters . . . But in a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. (*Id.* at 489-491).

The defense Mr. Haines raised for Fontenot is that she did not commit any of the crimes which were charged in the indictment. Fontenot testified that since 1978 her taxes have always been prepared by Cantu (Vol. 3, p. 2-25) and that she would always sign the 1040's before they were filled out by him. (Vol. 3, p. 2-26). She identified her signature on the 1981 1040 in her name but testified that she did not fill out the numbers on the return (Vol. 3, p. 2-26) and that she did not know who did. (Vol. 3, p. 2-27). She further identified her signature on the letter requesting an address verification (referred to at trial as the Internal Revenue Service "bait letter") and testified that she only filled in her social security number. (Vol. 3, p. 2-27). She testified that she did not write the other information on the letter (Vol. 3, p. 2-17) and that such information had already been completed when she signed it (Vol. 3, p. 2-18). She testified that she did not know if she was entitled to a thirty thousand dollar refund as represented on her 1981 return. (Vol. 3, p. 2-43).

In calling Fontenot to testify, Mr. Haines failed to consider the damaging effect her testimony would have on Cantu. Fontenot's answers on cross examination clearly implicated Cantu with regard to the tax return of Fontenot and the bait letter addressed to her. It follows that if she did not commit the crimes of which she was

accused, someone else did. Her testimony clearly pointed to Cantu:

> Q. All right. Then your testimony is Jose Cantu had written whatever he wrote on it before you wrote your signature?
> A. I would think that. (Vol. 3, p. 2-40).
> Q. Well, yes or no?
> A. Well, I don't know. I didn't see him do it. He wasn't there. It was wrote on there at the time. I assumed he must have gotten around to doing my taxes. (Vol. 3, p. 2-41).
> Q. Jose does your taxes?
> A. Yes.
> Q. And you just sign?
> A. Yes. (Vol. 3, p. 2-44).

Fontenot's statements, implicating Cantu and exculpating herself, reveal the underlying conflict of interest. A conflict will be found when the testimony of one co-defendant inculpates another (*White v. United States*, 396 F.2d 822 (5th Cir. 1968)) or when procedures or tactics are pursued that benefit one co-defendant while harming another. *Holland v. Henderson*, 460 F.2d 145 (5th Cir. 1972); *Baker v. Wainwright*, 422 F.2d 145 (5th Cir. 1970), *cert. denied*, 399 U.S. 927 (1969). The Fifth Circuit has also held that a conflict of interest exists "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausive arguments that are damaging to the cause of a co-defendant whom counsel is also representing." *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975).

Fontenot could have benefitted from the testimony of Cantu explaining, as he did at sentencing, that she did

not participate in any of the actions charged. Specifically, Cantu made the following remarks to Judge Morton at sentencing:

> Shirley here in being associated with me, she trusted me just like any of the clients have. And she is a victim, Your Honor. She truly is a victim of my schemes, not hers. (Sentencing transcript, p. 5).

Failure to call Cantu as a witness for Fontenot deprived Fontenot of Cantu's exculpatory testimony. The Fifth Circuit has found that "[w]hen a defense counsel has it within his power to void a proceeding against his client and, because of his representation of another is not completely free to exercise this power, he most assuredly has a directly conflicting interest." *Baker v. Wainwright*, 422 F.2d 145, 148 (5th Cir. 1970) *cert. denied*, 399 U.S. 927 (1969).

It is incorrect to characterize the separate defense of each petitioner as a joint defense. Clearly, the defense of one defendant that he did not commit the offenses charged does not necessarily exclude the possibility that a co-defendant might have committed those offenses. This is exactly what happened at trial in that Fontenot's testimony inculpated Cantu. A joint defense, in contrast, would require the assertion (explicit or implicit) by each defendant that neither committed the offenses charged.

Additionally, there existed a great disparity of evidence between petitioners. There was no evidence introduced against Fontenot except her own testimony and the two documents containing her signature which she identified at trial. Such disparity is further evidenced by the trial judge's inquiry into how a government inform-

ant's testimony would be admissible against Fontenot and the ensuing exchange at the bench:

> Mr. Longoria: Your Honor, we have showed circumstantially she is a member of this conspiracy.
>
> The Court: She don't even come close. (Vol. 2, p. 3).

The fact that there was no evidence against Fontenot either on the conspiracy count or on any counts except her return filed with the Internal Revenue Service (which she admitted at trial signing in blank at the request of Cantu), and an I.R.S. bait letter mailed to the I.R.S. (on which she identified her signature at trial) demonstrates the disparity of the cases presented against the co-defendants. The disparity in the evidence introduced against petitioners was prejudicial to Fontenot. This prejudice was compounded by Haines' conflict in representing both defendants in that his conflicting duty caused him to fail to present exculpatory evidence for Fontenot.

This Court has recognized in *Glasser v. United States*, 315 U.S. 60 (1942), that conflict is especially likely to be prejudicial in a conspiracy case when a disparity of evidence exists against co-defendants jointly on trial. This Court noted that the disparity of evidence:

> . . . is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as

> immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt. *Id.* at 67.

A potential for prejudice was recognized in *Campbell v. United States*, 352 F.2d 359 (D.C. App. 1965), involving a joint trial wherein the evidence against defendant Campbell was much stronger than against defendant Glenmore. Both defendants were represented by one retained attorney. The court noted that defense counsel made no effort to dissociate the two defendants and the fact that one attorney was representing both defendants certainly rendered his service to Glenmore much less effective. *Id.* at 361.

No objection was made as to joint representation by Mr. Haines on behalf of either defendant either at trial or on appeal. In fact, on August 29, 1984, Judge Cire, who was originally assigned the case, questioned petitioners as to their joint representation, and defendants signed a form entitled "Joint Representation by Counsel - Waiver of Conflict of Interest". Petitioners assert the waiver was made at the early stages of their representation, and at the time petitioners did not realize or understand the true implications of a joint trial. Petitioners relied on advice of counsel in making said waiver. Petitioners did not have the sophistication or legal expertise to realize fully the implications of a joint trial or defense.

In considering whether a valid waiver occurred herein this Court should examine the actions of defense counsel, the trial court and petitioners. The Court must indulge every reasonable presumption against waiver and cannot presume acquiescence in the loss of fundamental rights.

Tollett v. United States, 444 F.2d 622 (8th Cir. 1971). First, defense attorneys have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of a trial. ABA Code of Professional Responsibility DR5-105, EC 5-15 (1976). It is clear that "[a]n attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Holloway v. Arkansas,* 435 U.S. 475, 485 (1978), quoting *State v. Davis,* 514 P.2d 1025, 1027 (1973). Petitioners should not be punished because Mr. Haines failed to recognize or admit to such a conflict.

Second, "the trial judge bears the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused, and he should protect the right of an accused to have the assistance of counsel." *Glasser v. United States,* 315 U.S. 60 (1941). The inquiry as to waiver was made by Judge Cire and the case was tried before Judge Morton. Patent and harmful conflicts arose after the commencement of trial which were not recognized or cured by the trial court. Fed. R. Crim. P. 44(c) imposes a continuing duty on the trial judge to protect the rights of defendants. Specifically,

> . . . the mere fact that a rule 44(c) inquiry was conducted in the early stages of the case does not relieve the court of all responsibility in this regard thereafter. The obligation placed upon the court by rule 44(c) is a continuing one and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest.

Notes of Advisory Committee on 1979 Amendments to Fed. R. Crim. P. 44.

Third, defendants usually "will not know what their rights are or how to raise them. This is surely true of the defendant who may not be receiving the effective assistance of counsel as a result of conflicting duties owed to other defendants." *Cuyler v. Sullivan*, 446 U.S. 335, 352 (1980) (Brennan, J., concurring).

The Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. *Holloway v. Arkansas*, 435 U.S. 475 (1978). There can be no effective assistance when a conflict is shown to exist between the interest of a defendant and other interests served by his attorney. *Glasser v. United States*, 315 U.S. 60 (1942).

II. The failure of defense counsel or the trial judge to move for relief from prejudicial joinder constituted error so serious that it deprived petitioners of a fair trial.

Fed. R. Crim. P. 14 states in pertinent part as follows:

> If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires . . .

Counsel for co-defendant Austin recognized the potential for such prejudice and moved for severance. Said motion was granted by Judge Cire on October 22, 1984. It was error on the part of counsel for Cantu and Fontenot

not to move for severance because Cantu's testimony would have exculpated Fontenot and the testimony of Fontenot inculpated Cantu. (These points were addressed in the foregoing argument concerning conflict of interest.)

The Fifth Circuit recognizes that prejudice can result from a defendant being unable to call a co-defendant to testify on his behalf at a joint trial. *Abbott v. Wainwright,* 616 F.2d 889 (5th Cir. 1980). Fontenot could have shown the essential elements necessary to be entitled to a severance as set out in *United States v. Butler,* 611 F.2d 1066 (5th Cir. 1980): (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and, (4) that Cantu would have testified if the case had been severed.

In conspiracy cases, where joinder was originally proper under Fed. R. Crim. P. 8(b), and the charge which originally justified joinder fails for lack of evidence, the "trial judge should be particularly sensitive to the possibility of such prejudice". *Schaffer v. United States,* 362 U.S. 511 (1960).

Courts must balance possible prejudice in joint trials against judicial economy. *United States v. Crawford,* 581 F.2d 489 (5th Cir. 1978). "It should grant a severance if jurors in a joint trial may not be able to determine the culpability of a defendant fairly, impartially and solely on the basis of evidence relevant to the individual defendant." *Id.* at 491. In *Crawford,* the Fifth Circuit found that "[b]ecause the evidence was uncomplicated and only two defendants were involved, the inconvenience and expense of separate trials would not have been great." *Id.* at 492.

III. The admission into evidence of a co-defendant's conviction constituted plain error so serious that it requires reversal.

The trial record is replete with statements that Austin was a co-defendant of Cantu and Fontenot and that he was convicted prior to their trial. Such statements were made by both government and defense counsel. Government informant Jim Brady testified, on cross-examination, that he had heard Austin was convicted. (Vol. 3, p. 2-17). During final arguments, the conviction of Austin was raised by the government more than once:

> We know that Mr. Brady was approached by Mr. Austin, a co-conspirator, who we now know from the evidence was convicted and is now in prison. (Vol. 3, p. 2-85).
>
> And if you want to go that far, and I submit you should and you can, who is Mr. Cantu picking for his friends? If he is picking Mr. Austin, a person who we know is not above stealing $27,000.00 of the government's money out of this little scheme that was cooked up. (Vol. 3, p. 2-104).

The conviction of co-defendant and alleged co-conspirator Steve Austin should not have been admitted into evidence during the trial of Cantu and Fontenot. The Fifth Circuit stated, in the case of *Leroy v. Government of Canal Zone*, 81 F.2d 914 (5th Cir. 1936), that the previous conviction of a co-defendant is not admissible in evidence against subsequently tried co-defendants. That holding is proper because of the obvious harm that such evidence inflicts upon a defendant at trial. In the case at hand the conviction of co-defendant and alleged co-conspirator Austin was improperly admitted into evi-

dence and argued to the jury. In *Babb v. United States*, 218 F.2d 538, 541 (5th Cir. 1955), the Fifth Circuit determined that it was error to allow a co-defendant and alleged co-conspirator to testify, over objection, that he had pled guilty to all counts of the indictment. The Fifth Circuit stated that if the guilt of a co-defendant comes before the jury a cautionary charge must be given. *Id.* at 541.

The references to the guilt and conviction of co-defendant and alleged co-conspirator Austin were prejudicial. Such references required at least a strong cautionary instruction to disregard Austin's conviction in determining the guilt or innocence of petitioners. However, instead of a cautionary charge with regard to Cantu, the district court's instruction was as follows:

> In the course of the trial, you have heard Steven Austin's name mentioned. You will note that he is named as a defendant in the indictment. The charges against him have been disposed of. You must not consider those charges or Austin's actions in deciding the guilt or innocence of Fontenot. You should consider Austin's actions with regard to the charges against Cantu only insofar as they bear on the question of whether Cantu and Austin conspired with or aided and abetted each other in the committing of the offenses charged in the indictment. Everybody understand that? (Vol. 3, p. 2-110, 111).

The foregoing instruction was clearly prejudicial and harmful in that it emphasized the consideration of Austin's conviction rather than urge its total disregard. It did not eliminate the clear implication of Cantu and Fontenot, but necessarily implicated them. Even if the trial judge's charge could be held to be cautionary, the Fifth Circuit

in *United States v. Baete,* 414 F.2d 782 (5th Cir. 1969), has ruled that even the strongest corrective instruction may be insufficient when the admitted guilt of one co-defendant necessarily implicates the others. *Id.* at 783-84. As shown by Jury Note number 2 discussed *infra* such was clearly the case herein.

The Fifth Circuit expounded on the prejudicial effect of admission into evidence of a co-conspirator's guilt in *United States v. Harrell,* 436 F.2d 606 (5th Cir. 1970). Jurors in conspiracy cases, equally with others, are aware "it takes two to tango". *Id.* at 614. In *Harrell,* as in the case at hand, defense counsel did not object to the admission of the guilt of a co-defendant and alleged co-conspirator. The Fifth Circuit found that such evidence, in light of aggravating circumstances, was so prejudicial that lack of objection was not fatal. The "aggravating circumstances" which would render even the strongest corrective instruction insufficient exist where the guilt of one co-defendant necessarily implicates the other as in a conspiracy case. *Id.* at 614.

In *Harrell,* the Fifth Circuit ruled that the admission into evidence of the co-conspirator's guilt without a sufficient cautionary instruction constituted plain error, requiring reversal. *Harrell* and this case are similar in that both cases involved conspiracy charges, both admitted evidence of a co-conspirator's guilt, and in both cases a cautionary charge could not "dispel the predictably certain reasoning a juror could be expected to indulge in as to the guilt of the alleged co-conspirators on trial". *Id.* at 614. (That the evidence of Austin's conviction was erroneously elicited and referred to by defense counsel does not mitigate its prejudicial effect. Such an error

by defense counsel was so prejudicial as to deprive defendants of a fair trial and certainly should have been raised on appeal.)

There is clear evidence in the record of the prejudicial effect of the admission into evidence of Austin's conviction. Jury Note number 2 reflects that the jury saw no evidence to prove that Jose Cantu received any money. Jury Note number 2 states:

> In regard to aiding and abetting, we see no evidence that Jose Cantu recieved [sic] any money. Since we agree that Steve Austin did recieve [sic] or "convert to his use" the money, will the aiding in [sic] abetting also apply to Jose Cantu even though we have no proof that he ever recieved [sic] any money.

The jury clearly considered co-defendant Austin's conviction on Count Nine of the Superceding Indictment in order to return its verdict of guilty against petitioner Cantu on that count. It is plain that the evidence of Austin's conviction was so strongly considered by the jury that the corrective instruction used by the trial court was insufficient to erase the prejudicial harm to petitioners.

The Fifth Circuit held that it was not plain error to admit Austin's conviction into evidence because (1) defense counsel mentioned this evidence during trial and closing arguments; (2) no objection was made to the introduction of this evidence; and (3) the district court properly cautioned the jury that Austin's conviction was not to be relied upon in determining petitioners' guilt or innocence. The Fifth Circuit is factually incorrect in that no cautionary charge was made as to Cantu. In

addition, however, petitioners should not be punished because of error by their trial counsel.

That the admission of Austin's conviction prejudiced the jury concerning appellant Cantu is evidenced by Jury Note number 2. The result is clearly that appellant Cantu's guilt or innocence was inextricably linked in the jury's analysis to the conviction of Steve Austin. The only possible conclusion is that the trial court's charge to the jury served to stress consideration of Austin's conviction rather than to eliminate its consideration, constituting plain error. The Fifth Circuit's holding on this issue must therefore be reversed.

Fed. R. Crim. P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The standard for plain error has been defined as that which will "result in the likelihood of a grave miscarriage of justice or circumstances that seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984). The case at hand involves circumstances similar to *Harrell* which require that the convictions of Cantu and Fontenot be reversed in order to preserve their right to a fair trial.

IV. The trial court's refusal to permit a presentence investigation report before sentencing was violative of the purpose of Federal Rule of Criminal Procedure 32(c).

The sentencing process below certainly requires appellate review. The district court did not comply with Fed. R. Crim. P. 32(c)(1) which requires that:

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

This Court, in the case of *Williams v. People of the State of New York*, 337 U.S. 241 (1949), recognized the importance in the trial court's sentencing process of obtaining broad information concerning the defendant and the desirability of individualizing the punishment: "Highly relevant—if not essential—to [the sentencing judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247.

With regard to Rule 32, the Fifth Circuit has stated that the information provided by the report of a trained probation officer, together with the evidence presented at the trial itself, give the sentencing judge the only reliable basis for exercise of his sentencing discretion. *United States v. Long*, 656 F.2d 1156, 1164 (5th Cir. 1981). The sentencing deficiency in *Long* centered upon the failure of the trial court to evaluate a presentencing report and the court's two statements on the record that no presentence report could change his mind. *Id.* at 1165.

The failure of the trial court to obtain and evaluate a presentence report and the readiness of that court to sentence Cantu and Fontenot immediately after conviction, and without adequate information and reflection,

constitutes a critical abuse of requisite judicial discretion in sentencing. The trial court stated "I don't need a presentence investigation in this kind of case. I am perfectly competent to render sentence and I have all the information at hand that I need at hand." (Vol. 4, p. 3-7). Such representation must be closely scrutinized in light of the court's earlier statements that he had gone to sleep during the trial (Vol. 3, p. 2-82) and that "I will admit my mind wandered when he was up there because I was not paying too much attention." (Vol. 3, p. 2-81).

The Fifth Circuit, in *Long*, stated that "Rule 32 denies any judge the discretion to reduce the hearing on sentence to a meaningless formality." *Id.* at 1165 (quoting *United States v. Dinapoli*, 519 F.2d 104, 108 (6th Cir. 1975)). Petitioners urge that such was the case herein. The following statements demonstrate the trial court's predisposition at sentencing: "He [Cantu] is a crook. He has been convicted of being a crook." (Vol. 4, p. 3-9); "I am going to tell you right now I think she lied like a rug . . . She is not going to get probation. I will tell you that right now." (Vol. 4, p. 3-13); "If you want to have them [family members] all stand up back there and impress me with them, go ahead." (Sentencing transcript, p. 3); "All I am concerned about is his violation of law here and the jury has found him guilty, and I am going to punish him. That is just what I am going to do." (Sentencing transcript, p. 10); "I can't turn her loose after she committed blatant perjury on this stand in any way, shape or form. I would have been lenient with her otherwise. But I will not do it . . . And as a result, I am going to incarcerate her. I will tell you I am." (Sentencing

transcript, p. 15). (There is no conclusive evidence that Fontenot committed perjury.)

The Fifth Circuit in *Long* further stated that "[t]hose who have studied the sentencing problem in depth are unanimous in recommending that presentence reports be secured in all felony cases, particularly those involving first offenders." *Long* at 1165. Cantu and Fontenot are first offenders. The trial court in the instant case reduced the hearing on sentence to a meaningless formality which was a clear abuse of judicial discretion. Trial counsel's failure to object to the lack of a presentencing investigation constitutes error and is further evidence of his ineffective representation.

The Fifth Circuit, in its opinion on the petition for rehearing in this case, stated that the district court could dispense with the presentence report because it had found that it had sufficient information "at hand" and because appellants were permitted their right of allocution at the sentencing hearing. Contrary to the trial court's statement, there was a paucity of information concerning petitioners before the trial court. No real attempt was made to supply the judge with relevant information; much less was he provided with comprehensive information sufficient to allow a meaningful exercise of sentencing discretion. The Fifth Circuit's decision in this case conflicts directly with its expressions of the importance of presentence reports for first offenders. Such a holding is also contrary to this Court's recognition of the need for broad information in making sentencing determinations and should therefore be reversed.

V. The failure of appellate counsel to raise any issue on appeal for petitioner Fontenot and an insufficient issue for petitioner Cantu constituted ineffective assistance of counsel in violation of petitioners' Sixth Amendment rights.

Defense counsel at trial filed the brief in petitioners' original appeal. That appeal asserted only one point of error related to the admission of evidence obtained from an asserted illegal search. The point of error raised by petitioners' Brief on Appeal, if successful, would have led to the exclusion only of evidence against Cantu. None of the evidence which would have been excluded was incriminating against Fontenot. Therefore petitioner Fontenot had no appeal.

No documents secured through the search warrant attacked by original appellate counsel were used as evidence against Fontenot. Fontenot was convicted of filing a false tax return and of mail fraud. The evidence related to these convictions was mailed to the government and not obtained in the search. Because evidence obtained in the search was not used against Fontenot, had the Fifth Circuit found the original appeal to have merit, it could not have reversed Fontenot's conviction on that basis. It follows that petitioner Fontenot was denied effective assistance of appellate counsel and the determination of the Fifth Circuit to the contrary should be reversed.

The failure of original appellate counsel to raise sufficient issues on appeal constituted ineffective assistance of appellate counsel for petitioner Cantu. This Court has held that appellate counsel must "support his client's appeal to the best of his ability". *Andres v. State of*

California, 386 U.S. 738, 744 (1967). The Eleventh Circuit has interpreted this burden in *Cannon v. Berry*, 727 F.2d 1020 (1984) as follows:

> . . . [A]ppellate counsel must function as an advocate and actively promote the client's position by scrutinizing the record for errors and by presenting legal arguments in the client's favor. (*Id.* at 1020.)

Appellate counsel asserted, on behalf of petitioner Cantu, only the improper search of Cantu's office. The Fifth Circuit, in its opinion on the petition for rehearing in this case, held that this constituted effective assistance of appellate counsel and that counsel was not obligated to raise other meritless issues on appeal. Petitioners assert that additional issues of merit were clearly omitted from the original appeal.

The Fifth Circuit has recognized that submission by appellate counsel of a one sentence appellate brief constituted ineffective assistance of counsel. *Passmore v. Estelle*, 607 F.2d 662 (1979). Asserting only one error as to Cantu certainly does not rise to the level of actively supporting Cantu's appeal after careful scrutiny of the record. Therefore, Cantu and Fontenot were denied effective assistance of appellate counsel, and the contrary determination by the Fifth Circuit should be reversed.

CONCLUSION

This Court should grant certiorari to review the Fifth Circuit's opinion in the above case.

DATED: June 9th, 1986.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Jose G. CANTU and Shirley A. Fontenot,
Defendants-Appellants.

No. 85-2185

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Oct. 24, 1985.

Defendants were convicted in the United States District Court for the Southern District of Texas of charges arising out of conspiracy to file false income tax returns, and they appealed. The Court of Appeals held that: (1) search warrant for office of defendant was not too general, and (2) warrant adequately described area subject to government search.

Affirmed.

Michael P. Haines, J. L. Sadick, Houston, Tex., for defendants-appellants.

Henry K. Oncken, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., Vincent L. Gambale, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

On appeal in this case we are asked to determine whether the district court properly allowed into evidence materials and documents seized during a warrant-authorized search. Because we find that the search was legally authorized and conducted, we affirm.

I

The evidence in this case showed that from about January 1, 1982 to March 30, 1983, the appellant Jose Cantu conspired with Steven Austin to file false income tax returns for the years 1980 and 1981 in the names of the appellant Shirley Fontenot, Austin, and four other individuals. The returns claimed unjustified tax refunds for 1981 totalling $239,166. Additionally, an unjustified claim for $18,955 was filed in 1980 by Cantu and Austin on behalf of Austin. These claims were supported by false W-2 Forms fabricated by Cantu.

The Internal Revenue Service's Criminal Investigations Division received information about this tax fraud conspiracy from a friend of Austin, James Brady, who had refused to participate in the fraudulent tax scheme. The government verified Brady's information and other indications of tax fraud by Cantu. Based upon this and other information,[1] the IRS procured a search warrant on March 22, 1983 to search the "office of CARLOS CANTU TAX AND BUSINESS CONSULTANT located behind the only door on the left after entering the front

1. Probable cause supporting the search warrant is not contested in this appeal.

door of Suite 375 at 5959 West Loop South, Houston (Bellaire), Texas." During the search, the government seized numerous tax returns and other documents that revealed the extent of the appellants' involvement in the tax scheme.

Jose Cantu, Shirley Fontenot and codefendant Steven Austin[2] were charged in an eighteen-count indictment consisting of one count of conspiracy to commit tax fraud in violation of 18 U.S.C. § 286, seven counts of filing false tax returns in violation of 18 U.S.C. § 287, one count of theft of government money by converting a tax refund check in violation of 18 U.S.C. § 641, and nine counts of mail fraud in violation of 18 U.S.C. § 1341. Cantu was convicted on all counts. Fontenot was convicted on one count of filing a false tax return and on two counts of mail fraud.[3]

Cantu was sentenced to a total of six years imprisonment to be followed by a five-year term of probation, and was ordered to pay $15,000 restitution. Fontenot was sentenced to eighteen months imprisonment, to be followed by a three-year term of probation. The appellants filed a timely notice of appeal.

II

The sole contention of Cantu and Fontenot on appeal is that the district court erred in denying their motion to suppress the materials seized during the search of Jose Cantu's office on March 22, 1983. These materials

---

2. Austin was convicted in a separate trial. His appeal to this court, No. 85-2138, has been briefed and argued.

3. Fontenot was acquitted by the district court of fifteen of the eighteen counts before the case was submitted to the jury.

consist primarily of copies of the false tax refund claims and bogus W-2 forms. Appellants contend that the warrant insufficiently described the items to be seized and as such permitted a "general" search in contravention of the fourth amendment. They further contend that the search warrant and affidavit, in naming the office of Carlos Cantu Tax & Business Consultant as the place to be searched, did not authorize a search of the office of Jose Cantu.

A.

The appellants argue that the March 22 warrant was too general because the warrant did not limit the authorized search to materials relating to the claims of tax fraud that the government had knowledge of at the time of the search. Because the warrant left the agents with too much discretion as to the things subject to seizure, the appellants contend it was unconstitutional. To support this contention, the appellants cite *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965).

In *Stanford*, the warrant broadly authorized the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas." 379 U.S. at 478-79, 85 S. Ct. at 508. After a four-hour search, the agents seized more than 2,000 items, including materials from Stanford's business, books written by such authors as Karl Marx, Jean Paul Sartre, Earl Browder, and Pope John XXIII, and personal papers including Stanford's marriage certificate, insurance polices, and household bills. No "records of the Communist Party" or any "party lists [or] dues payments" were found. *Id.* at 479-80, 85 S. Ct. at 509. Most of "the vast quantity

of materials seized in *Stanford* were [not] even remotely related to any legitimate government interest." *Nixon v. Administrator of General Services*, 433 U.S. 425, 462, 97 S. Ct. 2777, 2799, 53 L.Ed.2d 867 (1977). The Supreme Court held the *Stanford* search unconstitutional.

Unlike *Stanford*, however, in the instant case the warrant limited its authorization to the seizure of:

> Federal income tax returns and related forms and documents; copies of Federal income tax returns and related forms and documents; workpapers used in the preparation of Federal income tax returns; logs, rosters, writings, records, notes, or other lists regarding Federal income tax returns claiming refunds having been prepared and/or filed; U.S. Government checks resulting from false Federal income tax refund claims; typewriters used in the preparation of false refund Federal income tax claims; and all other property that constitutes evidence of the preparation and filing of false Federal income tax refund claims; any computer hardware or computer software.

[1] The case agent's affidavit and supporting exhibits attached to the warrant detailed the nature of the tax fraud investigation and identified specific documents. In his affidavit, the agent noted that, from his experience in investigating such matters, people engaged in multiple tax-refund schemes usually maintain lists or copies of the false W-2 forms or refund claims, as well as records of bank accounts used for depositing or cashing any U.S. Treasury checks they receive as refunds based upon the false claims.

The materials specified in the warrant were all directly related to the unlawful activity of the appellants. The

warrant clearly identified the documents subject to seizure, all of which were financial records related to tax fraud. The items actually seized, such as the false refund claims and bogus W-2 Forms, fell squarely within the scope of the warrant. Unlike *Stanford*, the warrant in the instant case was not too general.

[2] Moreover, the government made no error in not limiting the warrant to only those fraud claims about which they had specific information. There is no requirement that the government agents know in advance the specific items of evidence to be seized or that the items seized do in fact evince a crime, so long as they are within the scope of a properly authorized warrant. *See Andresen v. Maryland*, 427 U.S. 463, 479-82, 96 S. Ct. 2737, 2748-49, 49 L.Ed.2d 627 (1976).

[3] Finally, even if the government seized documents that were outside the specifications of the warrant, we could not reverse. Although the general rule is that only items described in a search warrant may be seized, we have recognized an exception that allows a government official reasonably to seize additional incriminating material discovered during an authorized search for other specified objects. *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). In *Garland*, we stated that "property which has a sufficient nexus to the crime being investigated may be seized at the time officers are properly excuting a warrant authorizing a search for other items." *Id.*

Thus, we reject the appellants' contention that the warrant was too broad and hold that all items seized were properly within the authority of the warrant.

B.

The appellants also challenge the validity of the search on the ground that the warrant authorized a search only of the office of Jose Cantu's brother, Carlos. The challenged search warrant authorized a search of the: "office of CARLOS CANTU TAX AND BUSINESS CONSULTANT located behind the only door on the left after entering the front door of Suite 375 at 5959 West Loop South, Houston (Bellaire), Texas."

At the suppression hearing, Jose Cantu testified about the physical layout of the premises at Suite 375, 5959 West Loop South in Houston. Suite 375 opens to a reception area around which are several doors to individual offices. Carlos Cantu had the name "Carlos Cantu Tax and Business Consultant" on the front door of the suite, the sole entrance to the suite, but did not have his name on the door of his individual office. Several separate businesses, including a fence company, a tax computer firm, an engineering firm, and the appellant's brother's consultancy, had offices in the suite at the time of the search. Jose Cantu's office did not face or open to the reception area. To reach his office, the agents had to walk through the fence company office, which was located behind the only door on the left after entering the front door of Suite 375. This was the exact location specified in the warrant. Thus, there was no discrepancy between the location specified in the warrant and the office actually searched.

[4] We find that the warrant adequately described the area subject to the government search. This court has stated that

> a warrant's description of the place to be searched need not meet technical requirements nor have the specificity sought by conveyancers. It need only describe the place to be searched with sufficient particularity to direct the searcher, to confine his examination to the place described, and to advise those being searched of his authority.

United States v. Haydel, 649 F.2d 1152, 1157 (5th Cir.), *corrected*, 664 F.2d 84 (1981), *cert. denied*, 455 U.S. 1022, 102 S. Ct. 1721, 72 L.Ed.2d 140 (1982). The warrant in this case satisfied these requirements and cannot be said to have limited the authorized search to only the individual office of Carlos Cantu.

III

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2185

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE G. CANTU and SHIRLEY A. FONTENOT,
Defendants-Appellants.

Filed April 9, 1986

Before: Henry A. Politz, Will Garwood and
E. Grady Jolly, Circuit Judges.

Per Curiam

Appeals from the United States District Court
for the Southern District of Texas
L. Clure Morton, District Judge, Presiding

ON PETITION FOR REHEARING
(Opinion October 24, 1985, 5th Cir. 1985,
774 F.2d 1305)

SUMMARY

Criminal Procedure

On petition for rehearing. Denied.

[1] Appellants' argument that they were denied effective assistance of counsel because they were represented by the same counsel is without merit.

OPINION

PER CURIAM:

[1] Of the several issues raised in this petition for rehearing[1] we find that the only issue we need consider is whether the appellants, Jose G. Cantu and Shirley A. Fontenot, were denied effective assistance of counsel because they were represented by the same counsel.[2] After requesting briefing by the parties and fully considering this issue, we conclude that this contention is without merit. Our conclusion is based on the following:

> (1) There was no conflict of interests between Cantu and Fontenot because their joint defense rested on the theory that *neither* party filed fraudulent tax returns.

---

1. The petitioners contend that it was plain error for the district court to allow evidence of their codefendant Steven Austin's conviction to be introduced into evidence. We reject this argument because (1) defense counsel mentioned this evidence during the trial and four times during closing arguments, (2) neither party objected to the introduction of this information, and (3) the district court properly cautioned the jury that Austin's conviction was not to be relied upon in determining the petitioners' guilt or innocence. The petitioners also contend that the sentencing hearing was reduced to a "meaningless formality" because the district court did not order the preparation of a presentencing report under Federal Rule of Criminal Procedure 32(c)(1). We reject this argument because under Fed. R. Crim. P. 32(c)(1), a district court may dispense with a presentence report if it finds that such a report is unnecessary. In the instant case, the district court so held when it found that it had all the necessary information "at hand." In addition, the district court granted the petitioners the opportunity to address the court regarding sentencing. We find no error in the sentencing hearing.

2. The petitioners claim that they were denied effective assistance of counsel because (1) their joint representation presented their counsel with a conflict of interest; (2) their counsel failed to move for relief from prejudicial joinder; and (3) an insufficient number of issues was raised on appeal. Since these arguments are obviously related, we combine them in considering the merits of the petitioners' claim to ineffective assistance of counsel.

(2) Shortly after an indictment was issued against the petitioners, the court questioned the petitioners concerning their joint representation and was satisfied that the petitioners did not perceive a conflict. In fact, both Cantu and Fontenot signed a form entitled "Joint Representation by Counsel—Waiver of Conflict of Interest."

(3) The petitioners' counsel did not err in failing to move for severance because the petitioners' defense theories were the same; that is, that neither party filed fraudulent tax returns. Separate trials on the same theory would have wasted judicial resources.

(4) Both petitioners had to be aware of the possibility of pursuing a different theory in separate trials because Steven Austin, a codefendant, successfully moved for severance to pursue a different defense theory. Yet each petitioner signed the waiver referred to above.

(5) Appellate counsel was not ineffective. The appellate contention that evidence from the search was improperly introduced related to the evidence against both Cantu and Fontenot. Counsel was under no obligation to raise other meritless issues on appeal.

Finally, to accept the petitioners' arguments relating to the effectiveness of counsel would allow unsuccessful defendants the right to change their defense theory after conviction. We certainly find no reason in this case to allow this result.

The petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO. H-84-176-S

UNITED STATES OF AMERICA

v.

JOSE G. CANTU

(Filed March 1, 1985)

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, March 1, 1985, with counsel, Michael Haines, pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of: Conspiracy to defraud the government with respect to claims, 18 U.S.C. 286 (Count 1); Submission of false claims to a government agency, aiding and abetting, 18 U.S.C. 2 & 18 U.S.C. 287 (Counts 2-8); Theft of government money, aiding and abetting, 18 U.S.C. 2 & 18 U.S.C. 641 (Count 9); Mail fraud, aiding and abetting, 18 U.S.C. 2 and 18 U.S.C. 1341 (Counts 10-18).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment

for a period of five (5) years as to Count 1. As to Count 2, the defendant is sentenced to the custody of the Attorney General for a period of One (1) Year, to run consecutive to the sentence imposed in Count 1. As to Count 3, the defendant is s ntenced to the custody of the Attorney General for a period of Five (5) Years, execution of sentence suspended and the defendant is placed on probation with supervision for Five (5) Years, to commence upon his release from incarceration. As to each Count 4-18, imposition of sentence is suspended and the defendant is placed on probation with supervision for a period of Five (5) Years, to run concurrent to each other and concurrent to the sentence imposed in Count 3.

As a special condition of probation, the defendant is to make restitution in the amount of $15,000.00 to the U.S. Government.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ L. CLURE MORTON
L. Clure Morton
U. S. District Judge

APPROVED: /s/ J. D.

Date: March 1, 1985.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO. H-84-176-S

UNITED STATES OF AMERICA

v.

SHIRLEY A. FONTENOT

(Filed March 1, 1985)

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, March 1, 1985, with counsel, Michael Haines, pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of: Submission of false claims to government agency, aiding & abetting; 18 U.S.C. 287 & 2 (Count 4). Mail fraud, aiding & abetting: 18 U.S.C. 1341 & 2 (Counts 12 & 17).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year as to Count 4. As to Count 12, the defendant is sentenced to the custody of the Attorney General for a period of Five (5) Months

and twenty-nine (29) days, to run consecutive to the sentence imposed in Count 4. As to Count 17, imposition of sentence is suspended and the defendant is placed on probation with supervision for a period of Three (3) years, to commence upon completion of her incarceration sentences.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ L. CLURE MORTON
L. Clure Morton
U. S. District Judge

APPROVED: /s/ J. D.

Date: March 1, 1985.

U.S. CONSTITUTION

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RULES OF CRIMINAL PROCEDURE

Rule 8. Joinder of Offenses and of Defendants

* * *

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

* * *

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

* * *

Rule 32. Sentence and Judgment

* * *

(c) *Presentence Investigation.*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

* * *

Rule 44. Right to and Assignment of Counsel

(c) *Joint Representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b), or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

* * *

Rule 52. Harmless Error and Plain Error

* * *

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

* * *

Supreme Court, U.S.
FILED
SEP 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-4

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSE G. CANTU AND SHIRLEY A. FONTENOT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether petitioners' representation at trial by the same attorney denied them the effective assistance of counsel.

2. Whether trial counsel's failure to seek a severance constituted plain error.

3. Whether the district court committed plain error in allowing petitioners' counsel to introduce evidence that a co-defendant had been convicted of the same charges at a separate trial.

4. Whether the district court abused its discretion under Fed. R. Crim. P. 32(c) in sentencing petitioners without first ordering a presentence report.

5. Whether petitioners were denied the effective assistance of counsel on appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-4

JOSE G. CANTU AND SHIRLEY A. FONTENOT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Al-A8) is reported at 774 F.2d 1305. The opinion of the court of appeals on rehearing (Pet. App. A9-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985, and a petition for rehearing was denied on April 9, 1986. The petition for a writ of certiorari was filed on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner Cantu was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 286; seven counts of filing

false claims against the United States, in violation of 18 U.S.C. 287; one count of theft of government money by converting a tax refund check, in violation of 18 U.S.C. 641; and nine counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Fontenot was convicted on one count of filing a false claim and two counts of mail fraud.[1] Petitioner Cantu was sentenced to a total of six years' imprisonment, to be followed by a five-year term of probation, and was ordered to pay $15,000 restitution (1 R. 48).[2] Petitioner Fontenot was sentenced to 18 months' imprisonment, to be followed by a three-year term of probation (*id.* at 47).

1. The evidence at trial, the sufficiency of which is not disputed, is summarized in the original court of appeals opinion (Pet. App. A2-A3). Briefly, in 1982 and 1983 petitioner Cantu, an accountant, conspired with Steven M. Austin to file false income tax returns and thereby to collect tax refunds to which they were not entitled.[3] Cantu filled out the false returns and fabricated the accompanying W-2 forms. As part of this scheme, Cantu and petitioner Fontenot, Cantu's secretary, filed a false 1981 tax return in Fontenot's name. This return, which Cantu filled out and Fontenot signed, claimed a refund of $30,042 based on a false W-2 that stated that Fontenot had earned $39,850 while working for an oil company; in fact, Fontenot had earned $18,378 in 1981 and the oil company named in the W-2 proved to be fictitious. Fontenot also signed and forwarded to the IRS a letter confirming her phony claim for the 1981 tax refund. Overall, petitioners and Austin submitted

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[1]Fontenot was acquitted by the district court on 15 other counts before the case was submitted to the jury (II Tr. 22, 84).

[2]"R." refers to the record in the court of appeals.

[3]Austin was indicted with petitioners and was convicted at a separate trial. Austin's conviction was affirmed on appeal. *United States* v. *Austin*, 774 F.2d 99 (5th Cir. 1985).

claims for more than $220,000 through this tax fraud scheme. Pet. App. A2-A3; I Tr. 64-73, 84-86, 89-91, 114-141; II Tr. 22-23, 27.

2. On appeal, petitioners raised only a challenge to the admission into evidence of materials and documents—primarily copies of false tax returns and bogus W-2 forms—that had been seized during a search of Cantu's office. The court of appeals affirmed (Pet. App. A1-A8). It held that the warrant to search Cantu's office was not overbroad, that all of the items seized were properly within the authority of the warrant, and that the warrant adequately described the area to be searched (*id.* at A6-A7).

Petitioners then retained new attorneys and filed a petition for rehearing. In the petition, they raised four new issues. First, petitioners claimed that their right to the effective assistance of counsel had been denied because they had been represented at trial by the same attorney. Second, they asserted that the trial court had erroneously allowed evidence to be introduced that co-defendant Austin was convicted of the same charges at a separate trial. Third, petitioners contended that the trial court had misapplied Fed. R. Crim. P. 32(c)(1) by sentencing them without ordering a presentence report. Finally, they claimed that they had been denied the effective assistance of counsel on appeal.

The court of appeals denied rehearing in an opinion addressing the new issues raised in the rehearing petition. (Pet. App. A9-A11). The court held (*id.* at A10 n.1) that the introduction of the co-defendant's conviction was not error because defense counsel had himself elicited this evidence and had not objected to its admission at trial. The court also concluded (*ibid.*) that the district judge did not violate Rule 32(c)(1), because in refusing to order a presentence report he expressly found that he already had sufficient information for sentencing purposes and thereafter afforded

petitioners and their attorney ample opportunity for allocution at sentencing. Next, the court held (Pet. App. A10-A11) that petitioners' joint representation at trial did not deny them the effective assistance of counsel. The court pointed out that the defendants had a common defense, that petitioners had expressly waived any claim of conflict of interest, and that counsel's failure to move for a severance did not reflect any actual conflict since a severance was unwarranted. Finally, the court determined (*id.* at A11) that petitioners had not been denied the effective assistance of appellate counsel because their attorney "was under no obligation to raise other meritless issues on appeal."

ARGUMENT

1. Petitioners contend (Pet. 5) that "an actual conflict of interest existed in their joint representation and that the conflict adversely affected their attorney's performance." The court of appeals' decision rejecting this claim (Pet. App. A10-A11) is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

a. In *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), this Court held that "permitting a single attorney to represent codefendants * * * is not *per se* violative of constitutional guarantees of effective assistance of counsel" (435 U.S. at 482). Moreover, the Court held in *Holloway*, "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests" (*id.* at 483 n.5). As petitioners acknowledge (Pet. 10), prior to trial the district court inquired whether petitioners' joint representation constituted a conflict of interest; at that time, petitioners neither asserted nor demonstrated any such conflict. To the contrary, petitioners executed a written form entitled "Joint Representation by Counsel—Waiver of Conflict of Interest." Under these circumstances, petitioners waived any purported conflict of interest. The court of appeals so held

and its decision is consistent with those of the other circuits. See, *e.g.*, *United States* v. *Fahey*, 769 F.2d 829, 834-835 (1st Cir. 1985); *United States* v. *Noble*, 754 F.2d 1324, 1332-1335 (7th Cir. 1985); *United States* v. *Blum*, 753 F.2d 999, 1002-1006 (11th Cir. 1985).[4]

b. In addition, petitioners have failed to show that the attorney by whom they were jointly represented "actively represented conflicting interests" and that "an actual conflict of interest adversely affected [their] lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980); accord, *Strickland* v. *Washington*, 466 U.S. 668, 692 (1983). As the court of appeals noted (Pet. App. A10), petitioners had a joint defense at trial: each denied responsibility for the fraudulent tax scheme, and neither blamed the other for the unlawful transactions. Under these circumstances, the court of appeals was plainly correct in rejecting petitioners' belated claim of conflict. See, *e.g.*, *United States* v. *Elkins*, 774 F.2d 530, 541 (1st Cir. 1985); *United States* v. *Burney*, 756 F.2d 787, 793 (10th Cir. 1985); *United States ex rel. Cole* v. *Lane*, 752 F.2d 1210, 1220 (7th Cir. 1985).[5]

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[4]Petitioners' assertion (Pet. 10) that this waiver was ineffective because "at the time petitioners did not realize or understand the true implications of a joint trial" is not supported by any facts in the record. Their further argument (*id.* at 10-11) that the district court failed to renew the inquiry about a possible conflict once the trial was underway is meritless. See, *e.g.*, *United States* v. *Smith*, 778 F.2d 925, 930 (2d Cir. 1985)("there is no requirement that parties who have received adequate warnings on the dangers of joint representation be warned again after the trial begins").

[5]Contrary to petitioners' contentions (Pet. 6-7), Fontenot's testimony did not inculpate Cantu in any respect. Fontenot testified that she had "no idea" who completed the fraudulent returns, that she had not seen Cantu make the false entries, and that Cantu simply "wasn't there" (II Tr. 26-28, 40-42). This testimony was consistent with petitioners' joint theory that any number of people had access to Cantu's files and could

Defense counsel's failure to call Cantu as a witness for Fontenot—ostensibly to exculpate her—also does not demonstrate an actual conflict. Petitioners point to no evidence that Cantu would actually have testified on Fontenot's behalf, thereby waiving his own Fifth Amendment rights and opening himself up to cross-examination by the prosecutor. See *United States* v. *Elkins*, 774 F.2d at 541. Petitioners also fail to show that Cantu had anything exculpatory to say on Fontenot's behalf. While petitioners point (Pet. 8) to Cantu's remarks at the sentencing—stating that Fontenot was "a victim of [Cantu's] schemes"—those statements do not exculpate Fontenot and, in any event, do not establish that Cantu would have offered such testimony at trial.[6]

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have filled out and submitted the fraudulent returns. Similarly, Fontenot's testimony on cross-examination (Pet. 7) that she merely signed a blank return and "didn't see [Cantu complete] it" but "assumed he must have gotten around to doing [her] taxes," did not contradict Cantu's defense. Cantu did not dispute at trial that he was a tax preparer or that he typically instructed his clients to sign blank returns; indeed, Cantu called four witnesses who testified that this was his practice (II Tr. 47-49, 53-55, 57-59, 63-64). Cantu's defense at trial simply did not depend on a claim that he did not ordinarily do Fontenot's taxes; rather, his defense was that he did not fill out the fraudulent 1981 return in issue—a defense that Fontenot's testimony did not contradict.

[6]Nor does the fact that there was more evidence introduced against Cantu than against Fontenot reflect a conflict. As a general principle, "the fact that the evidence against one defendant was somewhat stronger than that against another will not establish a conflict when both relied on the same line of defense." W. LaFave & J. Israel, *Criminal Procedure* § 11.9, at 91 (1984). See *United States* v. *Burney*, 756 F.2d at 793. Cf. *United States* v. *Huntley*, 535 F.2d 1400, 1406-1407 (5th Cir. 1976) ("The fact that one co-defendant is in a policy-making position and the other in a ministerial position does not necessarily constitute any conflict in their joint representation."), cert. denied, 430 U.S. 929 (1977). That was the case here. Moreover, defense counsel had no trouble highlighting the relative paucity of evidence against Fontenot in his closing argument (II Tr. 89-91), and the trial court credited Fontenot's lesser culpability by dismissing all but three counts against her. The disparity of evidence did not prejudice Cantu—and petitioners do not suggest otherwise—in view of the common defense and the overwhelming evidence against Cantu.

2. The contention that the district court's failure to grant petitioners a severance denied them a fair trial is baseless. Since defense counsel never sought a severance in the first place, the failure to grant a severance cannot be reversed unless it constituted plain error under Fed. R. Crim. P. 52(b) by " 'seriously affect[ing] the fairness, integrity or public reputation of [the] judicial proceedings.' " *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). Plainly, it did not. As the court of appeals held (Pet. App. A11), "petitioners' counsel did not err in failing to move for severance because petitioners' defense theories were the same * * * [and] [s]eparate trials on the same theory would have wasted judicial resources." Petitioners' reasons for a severance (Pet. 13)—that at separate trials Cantu would have "exculpated Fontenot" while at the joint trial Fontenot's testimony "inculpated Cantu"—are unfounded. As noted above (p. 6, *supra*), petitioners point to nothing in the record to indicate that Cantu would actually have testified for Fontenot at a separate trial. See, *e.g.*, *United States* v. *Espinosa*, 771 F.2d 1382, 1408 (10th Cir. 1985), cert. denied, No. 85-5709 (Dec. 9, 1985); *United States* v. *Lyles*, 593 F.2d 182, 192 (2d Cir.), cert. denied, 440 U.S. 972 (1979); *United States* v. *Wofford*, 562 F.2d 582, 586 (8th Cir. 1977), cert. denied, 435 U.S. 916 (1978). And there is no basis to suppose that Cantu's testimony would have been exculpatory. See, *e.g.*, *Espinosa*, 771 F.2d at 1408; *United States* v. *Parodi*, 703 F.2d 768, 780 (4th Cir. 1983); *Wofford*, 562 F.2d at 586. Nor do petitioners show that Fontenot's testimony at the joint trial genuinely inculpated Cantu. See, *e.g.*, *United States* v. *Centracchio*, 774 F.2d 856, 861-863 (7th Cir. 1985); *United States* v. *Sliker*, 751 F.2d 477, 492 (2d Cir. 1984), cert. denied *sub nom.* *Buchwald* v. *United States*, No. 84-6218 (Mar. 18, 1985); *United States* v. *Bautista*, 731 F.2d 97, 100 (1st Cir. 1984). Thus, the court of appeals was correct in concluding that

had trial counsel made the severance motion now urged by petitioners, the district court would have acted well within its discretion in denying it.

3. There is no merit to petitioners' contention (Pet. 14-18) that the trial court committed plain error in allowing evidence to be introduced that co-defendant Austin had been convicted at a separate trial. While the "conviction of a codefendant may not be used as substantive evidence of another's guilt" (*United States* v. *Davis*, 766 F.2d 1452, 1456 (10th Cir. 1985), cert. denied, No. 85-5364 (Oct. 15, 1985)), "it can be admitted for other, proper purposes" (*United States* v. *Melton*, 739 F.2d 576, 578 (11th Cir. 1984)). Here, as part of their overall strategy of blaming Austin for the scheme, it was petitioners themselves who first offered evidence that Austin had been convicted.

Counsel in his opening statement identified Austin as a convicted criminal (I Tr. 44). Thereafter, to support the defense that Austin was the "only guilty person" charged (II Tr. 101), defense counsel elicited on cross-examination that a government witness had "heard that [Austin] was convicted" (II Tr. 17). Finally, in his closing argument to the jury, defense counsel repeatedly emphasized that Austin had "perpetrated this alleged fraud," that it was Austin's scheme, that Austin was "convicted of this" and, as such, that Austin was a "convicted crook" (II Tr. 90-101).[7] The court of appeals correctly concluded that "because * * * defense counsel mentioned this evidence during the trial and four times during closing arguments" (Pet. App. A10), there was no plain error in the admission of the evidence. See *United States* v. *Chilcote*, 724 F.2d 1498, 1504 (11th

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[7]The prosecutor made a single, passing reference to Austin's conviction in his closing argument to the jury, and did not in any way invite the jury to infer petitioners' guilt from the conviction of Austin (II Tr. 86).

Cir.), cert. denied, 467 U.S. 1218 (1984) (no plain error particularly because defendant "himself capitalized on the introduction of the guilty plea"); *Wallace* v. *Lockhart*, 701 F.2d 719, 726 (8th Cir.), cert. denied, 464 U.S. 934 (1983) (no error where introduction of co-defendants' convictions "actually served to bolster the credibility of [defendant's] own testimony"). See also *United States* v. *Roth*, 736 F.2d 1222, 1227 (8th Cir. 1984)(introduction of co-defendant's guilty plea was harmless where "it was the defense counsel that first used the term 'guilty,' and emphasized this testimony during the cross-examination").

Finally, the trial court expressly instructed the jury that it could not use the evidence of Austin's conviction against petitioner Fontenot. And the court cautioned the jury that it could use against Cantu only "Austin's *actions* with regard to the charges"—as opposed to Austin's *conviction* on those charges. II Tr. 110-111 (emphasis added). There is no reason to suppose that the jury failed to follow the court's limiting instructions. See *Opper* v. *United States*, 348 U.S. 84, 95 (1954).[8] The court of appeals' decision rejecting petitioners' belated objection to the introduction of Austin's conviction is thus correct and does not warrant further review.[9]

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[8]Petitioners are mistaken in their contention (Pet. 17-18) that Jury Note No. 2 demonstrates the jury's failure to heed the court's instructions. That note simply asked whether Austin's receipt of fraudulently obtained money could be attributed to Cantu as well, under an aiding and abetting theory (Pet. 17). Nowhere does the note suggest that the jury improperly inferred Cantu's guilt from the prior conviction of Austin; indeed, the note does not mention Austin's conviction.

[9]Petitioners' reliance on *United States* v. *Harrell*, 436 F.2d 606 (5th Cir. 1970), cert. denied, 409 U.S. 846 (1972); *Babb* v. *United States*, 218 F.2d 538 (5th Cir. 1955); and *Leroy* v. *Government of Canal Zone*, 81 F.2d 914 (5th Cir. 1936), is misplaced. In each of those cases the government, not the defendant, elicited the evidence of a co-defendant's conviction and in no instance did the trial court give a limiting instruction.

4. Petitioners' claim (Pet. 18-21) that the trial court violated Fed. R. Crim. P. 32(c) by sentencing them without first ordering a presentence report is meritless. Rule 32(c)(1) expressly provides that the sentencing court may dispense with a presentence report if it "finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record." See, *e.g.*, *United States* v. *McCoy*, 770 F.2d 647, 649 (7th Cir. 1985); *Crooker* v. *United States Parole Comm'n*, 730 F.2d 1, 6 (1st Cir. 1984), vacated and remanded on other grounds, No. 83-2082 (Oct. 29, 1984); *United States* v. *James*, 528 F.2d 999, 1023 (5th Cir.), cert. denied, 429 U.S. 959 (1976). Here, the trial judge expressly found that a report was unnecessary because he had "all the information at hand" that he needed to exercise his discretion (III Tr. 7). Moreover, the court permitted defense counsel to prepare a sentencing memorandum, and accorded counsel and petitioners ample opportunity to speak at sentencing (*id.* at 5-7, 14). Petitioners do not identify any information that they would have made available to the court in a presentence report but failed to present orally. See *Hazelwood* v. *Arnold*, 539 F.2d 1031, 1033 (4th Cir. 1976). Under these circumstances, where the court "observ[ed] the defendant[s] throughout the trial" (*United States* v. *Latner*, 702 F.2d 947, 949 (11th Cir.), cert. denied, 464 U.S. 914 (1983)), and "afforded the defendant[s] and [their] attorney an opportunity to present statements and to bring to the court's attention any mitigating factors" (*Reed* v. *United States*, 529 F.2d 1239, 1241 (5th Cir.), cert. denied, 429 U.S. 887 (1976)), the trial court properly followed the mandate of Rule 32(c). Accord, *United States* v. *Chiantese*, 582 F.2d 974, 981 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979).[10]

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[10] *United States* v. *Long*, 656 F.2d 1162 (5th Cir. 1981), on which petitioners rely (Pet. 19-21), is easily distinguishable. There, the trial court denied a motion under Fed. R. Crim. P. 35 to reconsider a life

5. Petitioners' final claim (Pet. 22-23) that they were denied the effective assistance of appellate counsel is likewise meritless. This Court has held that the Constitution does not require appellate counsel "to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). "Experienced advocates," this Court observed in the *Jones* case, "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible" (*ibid.*). Courts should not "second-guess reasonable professional judgments and impose * * * a duty to raise every colorable claim suggested by a client" (*id.* at 754). Here, defense counsel chose to challenge on appeal only the lawfulness of the seizure of records that were ultimately used to convict both petitioners at trial (Pet. App. A11).[11]

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sentence imposed for murder. The court of appeals reversed and remanded for a new sentencing before another judge. While noting that a court retains the discretion to dispense with a presentence report (656 F.2d at 1164), the court observed that in this instance the trial judge had failed to make any finding at the time of the original sentencing that a report was unnecessary (*ibid.*). Moreover, the trial judge, while promising to read documents submitted by counsel in support of the Rule 35 application, ultimately denied the motion without reading any of them (656 F.2d at 1165). Beyond that, because the trial judge entertained the Rule 35 motion some 18 months after the trial had concluded (656 F.2d at 1165), his "lack of memory of the case"—reflected in excerpts from the proceedings incorporated by the court of appeals in an appendix to the decision (*id.* at 1166-1169)—together with the trial court's "prejudgment" of the appropriate sentence (*id.* at 1165), effectively "reduce[d] the hearing on sentence to a meaningless formality" (*ibid.*). Unlike the trial court in *Long*, the sentencing judge in this case made an express finding that he had sufficient information to exercise his discretion. Moreover, the sentencing followed the trial itself by only a few days, and at the time of sentencing defense counsel and petitioners were given a chance to bring all relevant information to the court's attention.

[11]Contrary to petitioners' contention (Pet. 22), the documents whose seizure was challenged on appeal were, in fact, offered at trial against both petitioners and were relevant to both petitioners' participation in the fraud (I Tr. 154-160; II Tr. 33-35).

That strategic decision does not constitute ineffective assistance, simply because it does not coincide with the legal judgment made by petitioners' new attorneys. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Sanchez* v. *United States*, 782 F.2d 928, 935 (11th Cir. 1986); *Cantone* v. *Superintendent, New York Correctional Facility*, 759 F.2d 207, 218-219 (2d Cir. 1985). In any event, the court of appeals ultimately considered, on the petition for rehearing, the issues that petitioners now claim should have been raised initially by prior counsel. Petitioners therefore could not have been prejudiced by their original counsel's failure to raise those issues on appeal. Moreover, because those issues are plainly insubstantial, petitioners would not have been prejudiced even if the court of appeals had declined to consider those issues when they were raised for the first time on rehearing. See *Strickland*, 466 U.S. at 693-694.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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